

**SUPERIOR COURT
OF THE STATE OF DELAWARE**

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

Submitted: May 18, 2005
Decided: August 25, 2005

STATE OF DELAWARE

v.

KEITH A. GARNER,

Defendant.

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ID#: 0404020580

ORDER

This decides Garner's motion for post-conviction relief filed under Superior Court Criminal Rule 61. Garner questions the maximum sentence, twenty-five years starting with three months in solitary confinement,¹ imposed on February 11, 2005 for Assault First Degree.² Garner's motion offers three grounds for relief:

- Garner's court-appointed attorney was ineffective;
- The sentence exceeded the Truth-In-Sentencing guidelines; and
- The solitary confinement portion violated Garner's double-jeopardy rights, because he also was locked-down

¹ See 11 *Del. C.* §3902.

² See 11 *Del. C.* §613.

administratively after he sliced his cell mate's neck with a shank.

Garner's claims are procedurally barred. The court also observes that they are without merit.

I.

Garner's first claims are procedurally barred under Superior Court Criminal Rule 61(i)(3) because he failed to challenge the sentence order through a direct appeal. That failure is a procedural default. If Garner had filed an appeal, our Supreme Court would have settled the matter. But because Garner waived his direct appeal, the sentence order stands.

Now, to knock out the sentence order, Rule 61(i)(3)(A) and (B) require that Garner must show cause for relief from the procedural default or, in other words, explain why his failure to appeal is excusable, and how he has been prejudiced. Garner has not even tried to meet either requirement. Also, Garner has not invoked Rule 61(i)(5). As to that, the sentence exceeds the sentencing guidelines, but not the statutory maximum. Thus, Garner's challenge to the sentence order under Rule 61 is procedurally barred.

Because he passed-up his direct appeal several months ago and ignored Rule 61(i)'s requirements here, it follows that Garner cannot establish his trial

attorney's ineffectiveness. Put another way, if Garner's plea and sentencing were error-free, then by definition Garner cannot establish either of *Strickland v. Washington*'s³ two tests for ineffectiveness: the representation fell below an objective standard and counsel's shortcomings were prejudicial.

II.

Also, as mentioned, Garner's claims are without merit. By pleading guilty to Assault First Degree, Garner aborted the criminal trial that was about to start on December 7, 2004. During the plea colloquy, Garner admitted that he was pleading guilty because he was guilty. He also admitted, orally and in writing, that no one had promised what his sentence would be. And, he acknowledged that the best he could hope for was two years minimum/mandatory and that he could receive as much as twenty-five years in prison. The possibility that Garner could receive the maximum prison sentence was put to him directly, orally and in writing.

If Garner had not pleaded guilty, a jury panel would have been brought to the courtroom. Garner then would have stood trial on the assault and other serious felonies. The victim was prepared to testify that on April 18, 2004 he was sixty-one years old and he was Garner's cell mate. The victim would have further

³ *Strickland v. Washington*, 466 U.S. 668 (1984).

testified that while the victim was asleep, Garner sliced the victim's neck with a razor. Bleeding profusely, the victim called for help and Garner cut him again, in the back. The victim also would have testified that Garner attacked because, in Garner's words, "You are not doing life."

The State would also have presented evidence that it took thirteen stitches to close the victim's neck wound and another thirteen stitches to close the cut on his back. The State would have produced a prison guard to testify that Garner admitted cutting the victim. Considering that the victim and Garner were locked in a prison cell by themselves and that the victim was wounded from behind, Garner's confession was superfluous. The court further observes that Garner's victim was an older, white collar criminal, awaiting trial on a federal charge. Considering the wounds' locations and Garner's violent past, a self-defense claim was untenable. In other words, even if it exposed him to a twenty-five year prison sentence, the plea was favorable to Garner. At no point was the State willing to offer Garner an even better plea.

III.

In light of the above, Garner's ineffective assistance of counsel claim cannot succeed. Garner has not attempted to show how his trial attorney's

assistance fell below an objective standard, much less how Garner could have avoided the assault conviction. Moreover, Garner's claim that his lawyer promised that Garner "wouldn't get any more time than two-year minimum mandatory penalty," is unimportant because Garner clearly benefitted by pleading guilty. By accepting the plea, Garner avoided trial, and inevitable conviction and sentencing on all charges.

Besides, Garner's claim is incredible. Garner told the court orally and in writing that no one had promised anything not stated in his written plea agreement, nor had anyone promised what his sentence would be. To the contrary, during the plea colloquy, the court reminded Garner that, "The State is not telling us what it is going to recommend when you're sentenced . . . but the court is not going to be bound by what the State recommends and the court is not bound by the [sentencing] guidelines." The court told Garner: "[T]he best you can hope for when you are sentenced is two years in prison, and it [c]ould be up to a full twenty-five."

As everyone anticipated, the court ordered a presentence report after accepting Garner's plea. Not only did the report confirm the shocking details of Garner's senseless, vicious attack on his defenseless cell mate, it revealed Garner's chilling past. Garner was serving a life sentence for a rape committed while he was

on juvenile probation. Furthermore, since his imprisonment for the rape, Garner was convicted of reckless endangering and reckless burning after he started fire in the prison. Thus, even before committing the prison assault here, Defendant was a juvenile delinquent, a rapist and an arsonist. Now, he appears incorrigible.

Considering that Garner was already serving a life sentence, the maximum sentence is the court's way of underscoring Garner's dangerousness. And, the solitary confinement demonstrates that even though he is a prisoner and the Department of Correction has administrative sanctions available to it, the court also can sanction "lifers" when they keep committing crimes while imprisoned. In any event, as discussed above, Garner's concerns about his allegedly unfulfilled plea agreement and the sentence were the proper subjects for a direct appeal.

Finally, the solitary confinement condition imposed as part of the assault sentence did not violate Garner's right against double jeopardy. While it is true that Department of Correction placed Defendant in isolation after the cutting, that was punishment for Garner's misbehavior while serving the earlier rape sentence. The solitary confinement imposed by the court was part of the sentence imposed for the assault.

Obviously, there is overlap between Garner's prison rules violation and

the assault. And there is overlap in the Department of Correction's and the court's purposes. They have a punitive aspect, in part. Nevertheless, Garner's conduct exposed him to similar sanctions and punishments for different reasons and in different ways. Garner did not merely possess prison contraband and attack another prisoner with it, which merited administrative lock-down; he also committed a full-blown, criminal assault, inflicting life-threatening, permanent injury on a defenseless, innocent person. Thus, Garner subjected himself to both administrative and judicial sanctions, which he deserved.

IV.

For the foregoing reasons, Defendant's February 17, 2005 motion is summarily ***DISMISSED*** under Superior Court Criminal Rule 61(d)(4).

IT IS SO ORDERED.

Judge

oc: Prothonotary (Criminal Division)
pc: Karen Volker, Deputy Attorney General
Dade Werb, Esquire
Keith Garner, *Pro Se* Defendant – DCC